IN THE

Supreme Court of the United States

October Term, 1948.

No. 450

NANNIE ELLYSON POLLARD, *et al., Petitioners*

vs.

CLAYTON HAWFIELD, *et al., Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Counter-Statement of Case

It should be noticed that the three last wills and testaments of the decedent, prior to the one in question, named and mentioned Florence Metz, Mary Elizabeth Harvey, and Aubrey Eaton Harvey as principal beneficiaries, and in the 1931 will, one of the appellants Ethel Ellyson Pollard, would take only if Mary Elizabeth Harvey pre-deceased the testatrix whereas, Mary Dowdy, was named as one of the residuary legatees.

In the 1932 will, the only one of the petitioners that was mentioned therein was Mary Dowdy and she would become a beneficiary only if Mary Elizabeth Harvey pre-deceased the testatrix and in the 1941 will, the same situation pertains. Thus it can be seen that in both the wills of 1932 and 1941, the respondents, Mary Elizabeth Harvey and Aubrey E. Harvey and Florence Metz were each given one-

fifth of the residuary estate and for any of the petitioners to have taken anything under any will, executed by the testatrix, all the wills, with the exception of the 1931 will, would have to be proven invalid and in that will, the said Mary Dowdy would have received one-sixth of the residuary estate so that from 1932 down to the execution of the will of April 14, 1944, the testatrix did not give a direct bequest to any of the petitioners. (R. 180.)

Also, it should be remembered that the testimony of Florence Metz indicated that J. Fontaine Hall had been notified to see the testatrix as she desired to execute a new will, but that he failed to see her during that period. (R. 126.)

The testimony of Nurse Edwards (R. 35) does not indicate that she testified that the testatrix had had pneumonia just prior to the execution of the will on April 14, 1944, but said testimony referred to a cerebral hemorrhage and pneumonia "four or five years ago", which resulted in testatrix having been bed-ridden thereafter.

A close examination of the evidence indicates that the attesting witnesses did testify that they were in the same room as testatrix at the time that she signed. Mrs. Blanche Hawfield was asked what the others in the room were doing when she signed the will as an attesting witness, and she stated that "they were watching me sign my name." (R. 180, 181.)

Also, on direct examination, the attesting witness, Stella A. McCombs stated that the testatrix signed the will in the presence of the other witnesses and that she signed it in the presence of the witnesses. (R. 181.)

The testimony of Mattie L. Edwards on direct examination, (R. 33, 34) indicates that the testatrix signed the will when all the witnesses were in the room and that

when she finished signing the will, the other witnesses also signed the will; that all the witnesses were present when she signed the will; and she indicated that each one saw the other witness the will and sign it.

When Mr. Maddox cross examined Dr. Clayton Hawfield (R. 185) the Doctor testified that he was in the room at the time Miss Ellyson signed, that he saw her sign, and that he also saw Mrs. Stella McCombs, Mattie Edwards, and, Mrs. Mary Hawfield, sign as witnesses. The evidence is abundantly clear that the witnesses were in the room when the testatrix signed and executed the will and that they then witnessed said will as attesting witnesses.

It is further to be remembered that when the will was offered to the Court as being fully proven, no objection whatsoever, was raised by either Mr. Maddox or Mr. Diamond on behalf of the petitioners. (R. 181.)

It is apparent that counsel for the petitioners attempts to seek a reversal on the ground that the Attorney for the respondents attempted to testify before the jury in his closing argument. Certainly counsel has a perfect right to draw an inference from testimony that was in the record and it is submitted that it was not irregular nor improper. Furthermore, attorney for petitioners did not ask the Court either to withdraw a juror or declare a mistrial so that his objection now comes entirely too late.

As to the claim of fraud, in this case, there was no evidence sufficient to go to the jury since it must be remembered that there was no showing in the case presented by the petitioners that any fraud was exercised upon the testatrix. The petitioners now seek to claim that Mrs. Metz, who testified as a witness for the respondents, was the one who was guilty of practicing a fraud upon the testatrix, but she testified that she did not inform the testatrix that

no money had been borrowed on the house for the reason that the testatrix did not seem to worry after Mabel Adams was discharged from the household.

The record indicates that Mabel Adams had been to see the testatrix on numerous occasions after the execution of the will (R. 118) and that on only one occasion thereafter was Mabel Adams refused admission to see the testatrix. (R. 181, 182.)

On the testimony of the nurses, it is well to bear in mind that Mr. Diamond, who represented Mabel Adams, and who was in exactly the same position as Mr. Maddox, objected to the attending nurse testifying to any matters concerning her professional work, which objection was sustained, and that Mr. Maddox, at that time, did not urge to the contrary. (R. 143.) On the question of the power of attorney of which the petitioners' attorney made much ado, it is well to bear in mind that the Court advised Mr. Maddox that he would allow the power of attorney to go in for the purpose of impeaching the creditability of the witnesses, but that at no time did Mr. Maddox properly attempt to do so. (R. 123.) When Mr. Diamond, Attorney for Mabel Adams, properly presented the same for purposes of impeachment, the Court properly allowed the power of attorney to become evidence in the case.

Contrary to the statement of counsel for the petitioners on page 5 of his brief, the trial judge never expressed the opinion that a confidential relationship had been shown to have ever existed between the Testatrix and the Respondent, Mrs. Metz. (Transcript 571.) The counsel for the petitioners at no time raised any objection to the trial of this case by the attorney who prepared the will, although he had ample opportunity to do so. (Petitioners' Brief, Pages 6 and 7.)

Counsel for Petitioners did not object to the legatees, as party plaintiffs or defendants, sitting in the rail during the entire trial, in accordance with the custom established in the District of Columbia, and at no time did he make mention of such fact to the Court.

The petitioners in their brief have drawn innumerable conclusions not warranted by the evidence, and to point each and every one of the same would require the respondents to deny nearly each and every paragraph stated by the petitioners. However, since all the testimony in the case is before the Court, only the matter contained therein should be considered. The record does not indicate that the trial judge openly criticized counsel for the petitioners without just cause and reason for doing so. Counsel for the petitioners was difficult to handle throughout the entire trial as can be shown by his manner in the Court room in speaking loudly when counsel approached the bench on matters which the jury was not supposed to hear, and by his loud talking making the same known to the jury. (R. 183, 184.)

It should be noted that when the trial judge completed his charge to the jury, he asked counsel if there were any exceptions to his charge and no exceptions were made by either party. (R. 175.)

Jurisdiction of this Court should not be invoked in a case of this type since no question of general importance nor one of substance relating to the construction or application of the Constitution is presented to this Court nor has the trial Court failed to give proper effect to any decision of this Court.

Summary of Argument

1a. There was no confidential relationship between the testatrix and the respondents within the meaning of the

cases and furthermore, it was not shown that the will was in any manner unnatural to raise any presumption of undue influence.

b. The question of competency of testatrix to execute a will was one for the jury and that it would be improper to state that a presumption of mental incapacity arose.

2. There was no substantial or clear evidence of any fraud or deceit.

3. The disqualification of the physician, Dr. Snyder, was proper and that it was within the sound discretion of the Court.

4. The testimony of the nurses as to the nature of the disease suffered by the testatrix was properly excluded and was not prejudicial.

5. The question of mental capacity and undue influence were properly submitted to the jury and that no objections were properly raised by the petitioners.

6. The charge to the jury was adequate, full and not misleading, nor confusing nor was any proper objection raised by the petitioners' counsel thereto.

7. The evidence prior and subsequent to the execution of the will, as the petitioners attempted to introduce the same, was properly excluded by the Court.

8. The petitioners were not deprived of any rights of cross examination by the Court, nor does it appear that it was in any manner prejudicial.

9. No prejudicial errors by the Court appears of record, nor was any rebuke by the Court prejudicial to the petitioners.

10. That due attestation of the will was proven.

Argument

1. The petitioners' attorney vigorously argues upon the authority of the case of Hagerty vs. Olmstead, 39 App. D. C. 170, that the Court should have instructed the jury that a presumption of undue influence arose in this case. It is well to bear in mind that in Hagerty case, *(supra)*, the testatrix, for a period of three months prior to her death, according to the testimony, bore symptoms of insanity and that there was a marked change in her habits, so as to disclose an abnormal mind. Also it was pointed out that at the time the will was executed, the testatrix was in extremis and died about 24 hours thereafter, and that the Executor and residuary legatees were not related to her and that the Executor knew that his brother, his wife, and he were the chief legatees under the will. He went so far as to advise the testatrix that the memorandum that she had prepared would not stand in Court, if contested, and suggested that a will be drawn in legal form, which he prepared. He even went so far as to leave out a small bequest that the testatrix desired to be given to the matron of the hospital for the reason he stated, that if embraced in the will, it might have given the impression that undue influence had been exerted upon the testatrix, and that finally he took the will to the testatrix, summoned witnesses and supported her up in bed while she signed the same. The facts in that case and in the case at bar are entirely different, for the chief beneficiaries in the case at bar were related to the testatrix, had nothing to do, according to the evidence, with the execution of the will, or the dictation of the terms of the will and had been mentioned as chief beneficiaries in the three prior wills drawn by the testatrix. In the Hagerty case, *(supra)*, the Court at page 176 stated as follows:

> "Where the party," says Mr. Redfield, "to be benefited by the will has a controlling agency in procuring

> its formal execution, it is universally regarded as a very suspicious circumstance, and one requiring the fullest explanation. * * * Undoubtedly, if the counsel of an old man whose mental faculties are impaired, though not destroyed by advanced age, should draw for him a will giving to himself the bulk of his estate, or a very considerable part of it, it would not be enough to show the formal execution of the paper, in the presence of two subscribing witnesses called in for the purpose. He must go further, and rebut the presumption by some evidence that the disposition made was in the exercise of the free will of the testator."

The Hagerty case, *supra,* mentions the case of Boyd vs. Boyd, 66 Pa. 283, in which the scrivener of the will, was a Justice of the Peace and legal adviser of the testator, and derived considerable benefit from the will, and the said testator had a short time previously, received a severe blow on his head. The Court laid down the proposition that where a party is to receive a considerable benefit from a will and is a stranger, having no claims from relationship, and stands in a confidential relationship, then a presumption of undue influence arises.

In the Boyd case, *supra,* the Court at page 293 stated as follows:

> "But where, being an entire stranger—having no claims from lawful relationship—he derives a very considerable benefit from the act, such direct proof, ought not to be, and is not required * * * General evidence of power exercised over the testator, especially if he be of comparatively weak mind from age or bodily infirmity, though not to such an extent as to destroy testamentary capacity, will be enough to raise a presumption, which ought to be met and overcome before such a will can be established. Particularly ought this to be the rule when the party to be benefited stands in a confidential relation to the testator."

A clear statement on this proposition also appears in the case, *In Re.* Jacobs Estate, 76 P. 2nd 128, wherein the legatees were not blood relatives and it was shown that the tes-

tatrix was 83 years of age, ill, in bed, but was mentally alert, and the Court at page 129 stated as follows:

> "Where one who unduly profits by a will, sustains a confidential relationship to the testator and actively participates in procuring the execution of the will, the burden is upon him to show that the will was not induced by his undue influence * * * Such presumption is not general alone by the existence of a confidential relationship. Such relationship assumes probative importance when disclosed in connection with the facts that the provisions of the propounded instrument are unnatural or unjust, and that the alleged wrongdoer was active in procuring the writing to be executed. If the facts of injustice and activity on the part of the wrongdoer are not established, a denial of probate, cannot be sustained * * * In other words, to use the language of the Supreme Court, there must in addition be proof that the one occupying such relationship displayed activity in the preparation of the will to his undue profit, meaning that there must be proof that the will is unnatural. Moreover, it is well settled that collateral heirs, such as brothers and sisters are not natural objects of bounty as that term is used in the interpretation of wills, and therefore, in cases such as this where the next of kin are collaterals and one or more are unprovided for in the will, the pretermitted persons in order to establish that the instrument is unnatural, must show affirmatively that they, had peculiar or superior claims to the decedent's bounty, and if no such claim is adduced, the instrument cannot be held to be unnatural."

There is further stated on page 129, the proposition that:

> "Nephews are not necessarily the objects of the bounty of an aunt".

Also, the Court in the case of MacMillan vs. Knost, 75 App. D. C. 261, 126 F. 2nd 235, in which the testatrix was 76 years of age and left her property to a distant relative, who would visit her from time to time in the District of Columbia, and who admitted he played up to her and took her on a trip and visit to California, had this to say, at page 262:

"As the court told the jury, undue influence involves 'improper means and practices * * *'. Influence gained by kindness and affection will not be regarded as 'undue', if no imposition or fraud be practiced, even though it induce the testator to make an unequal * * * disposition of his property in favor of those who have contributed to his comfort, * * * if such disposition is voluntarily made. *Confidential relations existing between the testator and beneficiary do not alone furnish any presumption of undue influence.* * * * One has the right to influence another to make a will in his favor. He may * * * lay his claims for preferment before the testator. They may be based on kinship or friendship or kindness or services or need or any other sentimental or material consideration. One can use argument and persuasion so long as it is fair and honest and does not go to an oppressive degree where it becomes coercive. * * * These instructions state the law of the District of Columbia. Moreover 'possibility or suspicion of undue influence' is not enough.

We find no evidence of oppression or coercion. We find no evidence of improper conduct, as we interpret that term. Appellant's conduct may arouse distaste in reasonable men. Reasonable men, measuring his conduct by their individual standards, may even call it improper. The jury in effect, have done so. But the evidence would not support a finding that appellant's conduct was improper according to commonly accepted standards. That, we think, is the test. In legal theory, the rights of litigants do not turn upon the predilections of a jury, and so upon accidental differences between one jury and another. For example, when negligence is in issue the law undertakes to measure conduct by the normal standards of normal men—the so-called 'reasonable man' or 'ordinary prudent man'—and not by the higher or lower standards of the men who try the issue. On the same principle, conduct which influences a will is not improper, and the influence is not undue, unless it falls below commonly accepted standards."

And furthermore, the Court in the case of Johnson vs. Newton, 58 App. D. C. 118, 25 F. (2d) 542, stated as follows at page 119:

> "As to the first of these grounds, it is not contended that there was any direct evidence of undue influence; but it is argued that the facts and circumstances surrounding the making of the will created a presumption of undue influence, entitling the appellant to go to the jury on that issue. We are of a different view. In Beyer v. Le Fevre, 186 U. S. 114, 22 S. Ct. 765, 46 L. Ed. 1080, the court said: 'Whatever rule may obtain elsewhere, we wish it distinctly understood to be the rule of the federal courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility of suspicion of undue influence. The expressed intentions of the testator should not be thwarted without clear reason therefor.' There is no evidence in this case that any one of the beneficiaries under the will sought in the slightest degree to influence the testatrix. Disinterested neighbors were present, and, if such an attempt had been made, their testimony would have indicated it. The court was right in refusing to submit the issue to the jury."

It has also been stated that the fact that an attorney, or a confidential adviser is named as Executor in a will, is not a suspicious circumstance or one which raises a presumption of undue influence, and which does not operate to discharge the general rule that the burden of proving undue influence is upon the party asserting it and it must be established by clear and convincing evidence. The Court in the case of Millard vs. Matthews, 80 U. S. App. D. C. 123, said as follows:

> "The Court correctly ruled that there was no evidence of undue influence. No presumption of undue influence arises from the fact that a will is drawn and its execution is supervised by the lawyer named as Executor."

The Court in the case of Kraeski vs. Clarke, 69 App. D. C. 348, 101 F. 2d 673, held where the evidence disclosed that the will of a testator, an old man, was drawn up by a lawyer who was procured by the wife of his nephew who with the testator's wife were the main beneficiaries under said will,

that there was no showing of fraud or undue influence even though the lawyer discussed the terms of the will and went over the same with the testator after the will was drawn, while they were alone on each occasion. See also *In re* Marlow's will, 106 N. Y. S. 131, Appeal of Livingston, *et al.* 26 A. 470, 63 Conn. 68; Woodson vs. Holmes, 43 S. E. 467, 117 Ga. 19 and also Carter vs. Dickson, 69 Ga. 82.

B. Petitioner's Prayer No. 7 is defective in that it attempts to have the Court instruct the jury that if a person is enfeebled immediately before or after the date of a transaction, so as to render him incompetent, to complete a transaction, a presumption of incapacity arises. This is not the law and neither the case of McCartney vs. Holmquist, 70 App. D. C. 334, 106 F. (2d) 855, nor Thomas vs. Young, 57 App. 282, 22 F. 2nd 588, states that a presumption of mental incapacity arises, but does state that it is a question of fact for the jury who may infer that a state of mind existing prior to the time of the execution of the will existed at the time the will was made. This instruction is confusing and the first paragraph is entirely different in meaning from the second paragraph of the instruction and since it does not state the law in the District of Columbia, it would have only tended to confuse and mislead the jury.

Petitioner's Prayer No. 3 was similar to one considered in the case of Millard vs. Matthews, *supra*, and was properly denied.

2. The Court properly directed a verdict on Issue No. 3, that no fraud or deceit had been practiced because there was no substantial evidence presented in the case, of either fraud or deceit. The facts that petitioners attempt to avail themselves of from the testimony of Mrs. Metz, could not be considered by the Court, when the respondents asked for a directed verdict on that issue. And furthermore, there is nothing in the testimony by Mrs. Metz to indicate that any

fraud was practiced upon the testatrix or that Mrs. Metz in any manner influenced or had anything to do whatsoever with the dictation of the terms of the will. Furthermore, the evidence is abundant that the testatrix was dissatisfied with Mabel Adams, her housekeeper of long standing. (R. 45, 109, 111, 112, 132, 144, 145, 146, 151, 161.)

On the question of fraud, our Court has stated on numerous occasions that fraud and deceit must be shown by clear and convincing evidence and not be evidence that is equivocal. In the case of Public Motor Service vs. Standard Oil Company of New Jersey, 69 App. D. C. 89, 99 F. (2d) 124, the Court at page 91 stated as follows:

> "We think that the trial Court correctly ruled that there was insufficient evidence of fraud to take the case to the jury. The rule is settled that in an action at law where the issue is fraud, the party relying upon fraud must show that the misrepresentations asserted were made either with knowledge of their untruth or in reckless disregard of truth".

And states further on the same page that

> "it is settled also that fraud must be shown by clear and convincing evidence (cases) * * * and by evidence which is not equivocal, that is, equally consistent with either honesty or deceit * * * cases."

There is no substantial or clear and convincing evidence of any fraud exercised upon the testatrix by anyone involved in the preparation of the will. The mere fact that a dispute or disagreement arose between the testatrix and Mabel Adams does not show any fraud.

At page 93, the Court also stated as follows:

> "It may be that the records disclose a scintilla of evidence indicating fraud; but, if so, that would not be enough to sustain a verdict of wrongdoing. (Authorities cited.)"

In the case of Robertson vs. Duvall, 27 App. D. C. 535, at page 544, the Court stated as follows:

> "There was evidence that the testator was displeased with the caveator. Such resentment often leads a tes-

> tator to cut off a legatee, but where the testator has the capacity to make a will, it is his will, whether the resentment is well or ill founded; the testamentary paper is not invalidated on account of it."

Thus it can be seen that the fact that a disagreement arose between the housekeeper of long standing and the testatrix, did not place any duty upon Mrs. Metz, or anyone else, to divulge the fact that no loan had been placed against the home as the testatrix supposed, especially when the evidence indicated that after the dismissal of the housekeeper, the testatrix did not seem to worry about anything concerning the household. Therefore, it seems there was no clear and convincing evidence as to any fraud as shown by the evidence presented by the petitioners. The Court properly directed a verdict on the issue of fraud and deceit in favor of the respondents.

Furthermore, in the case of Mackall vs. Mackall, 135 U. S. 167, 34 L. Ed. 84, 10 S. Ct. 705 Rep. the Court at page 172 stated as follows:

> "Influence gained by kindness and affection will not be regarded as 'undue' as no imposition or fraud be practiced, even though it induce the testator to make an unequal and unjust distribution of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made. Confidential relations existing between the testator and beneficiary do not alone furnish any presumption of undue influence."

Also in the case of Leach vs. Burr, 188 U. S. 510, 47 L. Ed. 567, 23 Ct. Rep. 393, which was a case appealed from this Court, the Court at 516 stated as follows:

> "Upon questions of this kind (undue influence, fraud, and mental capacity) submitted to a jury, the burden of proof in this District, at least, is on the caveators. The caveators in the present case failed to sustain this burden, and we are of the opinion that the trial Court did not err in directing a verdict against them."

In the case of Gunning vs. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720 the Court at page 94 stated:

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' "

See also Shapiro vs. Rubens, 166 F. (2d) 659.

3. It is earnestly urged that the Court was not in error and did not abuse its discretion in refusing to allow the testimony of Dr. Luther H. Snyder, as an expert on mental capacity. A perusal of the record (R. 99-101) indicates that the Doctor was introduced to show that he was an expert on the particular form of paralysis that was claimed the testatrix had, and that the appellants were attempting to show by his testimony that since he had handled cases of paralysis, then he could testify as to the effect of paralysis on the mental facilities of the testatrix. The Court properly excluded this testimony, and it submitted that the exclusion of his proposed testimony was not error and was not prejudicial in any manner to the petitioners. Furthermore, there was no attempt to properly qualify the Doctor by showing that he had ever handled any cases which involved the mental capacity of the patient, or that he had had any experience whatsoever along that line, either in practice or in training.

Furthermore, the Trial Judge stated that Dr. Snyder could testify as a physician generally but could not give his opinion as to effect of paralysis on mental faculties. (R. 101.) As the Circuit Court pointed out in its opinion that no where did it appear from the evidence that Dr. Snyder

had any experience or training in mental diseases. Nor does it appear he ever treated or observed any paralytic case which had resulted in the impairment of the mind of a patient. (R. 188.)

The only attempt Mr. Maddox made was to show that he had handled cases of paralysis and had handled paralytics. This we submit under any rule, would not have qualified the Doctor to testify. In the District of Columbia, our Court has held that the question as to whether a witness can qualify as an expert so as to answer a hypothetical question lies in the sound discretion of the trial justice and his rulings thereon will not be disturbed unless clearly erroneous. This was enunciated in the case of District of Columbia vs. Chessin, 61 App. D. C. 260, 61 F. (2d) 523. Furthermore, in the case of Lewis vs. American Security and Trust Co., 289 F. 916, 53 App. D. C. 258, the Court at page 264 decided that

> "Where a physician is well acquainted with the decedent and had testified from his observation that he had noticed no change in the mental powers of the decedent, and had also stated that he was not an alienist, it was proper to exclude cross-exam. of him by means of hypothetical questions, since his information was based on his observation, and the fact that he was a physician, while it added weight to his testimony, did not change its character."

It stated as follows at page 264:

> "Thereupon counsel for the caveators propounded a hypothetical question to the witness, to which counsel for the caveatees objected, on the ground that the witness had not testified as an alienist, but that no objection would be interposed to any question based upon the observation of the witness. This objection was sustained by the Court, and thereafter the witness was interrogated, without objection, as to his observation of patients having senile dementia and other similar ailments.
> The foregoing rulings were correct. The witness was not an alienist, stated that he was not, and his in-

formation was based upon and limited to observation. The fact that he was a physician added weight to his testimony, but did not change its character."

And furthermore, in the case of Hamilton vs. U. S., 26 App. D. C. 391, the Court stated as follows:

"The Court correctly refused to permit Hudson to testify as an expert concerning the mental condition of the appellant at the time of the homicide. Hudson was not competent to so testify, [being a medical school student although he had attended lectures on mental diseases]. He was offered for that purpose only. Apart from the incompetency of the witness disclosed by the record, this court has said: 'The question as to how much knowledge a witness must possess of a certain science or art in order that his opinion shall be competent evidence is a matter which, in the nature of things, must be left largely to the discretion of the trial court, and its ruling thereon will not be disturbed unless clearly erroneous.'"

In the case of Taylor vs. U. S., 7 App. D. C. 27, a murder case in which the Trial Court refused to allow a doctor to testify who was a young practitioner of medicine and who had practiced for only two years, dealing exclusively with nervous diseases in hospitals, and when it was shown that he did not have any experience whatever with gun wounds, the Court properly refused to allow him to give his opinion as to whether the three wounds which had been inflicted six months previously were caused by one or two balls. The doctor who was allowed to testify, was shown to have been qualified because of his study of mental disorders with an average of 15 cases of insanity under his observation each year; having had appellant constantly under his observation only a year past; and having made five formal examinations of him.

The rule as stated in New York, Mass., and Maine and other states, is that only an alienist can legally testify as to the mental capacity of the decedent (See *In Re* Lindow's Will, 270 N. Y., Suppl. 771, Old Colony Trust Co.

vs. DiCola, 123 N. E. 454, 233 Mass. 119, Hutchins vs. Ford 19 A. 832, 82 Me. 363). In analyzing all the cases in which doctors have been allowed to testify as to mental capacity, there must have been a showing that either in the training of the physician or in his practice, he has dealt with questions of mental capacity and mental diseases and disorders of the patients. See 54 A. L. R. 863.

4. It is submitted that the Court's charge was clear and unambiguous and that it is interesting to note that in the case of Johnson vs. Newton, *supra*, at page 19, the Court said as follows:

> "Whatever rule may obtain elsewhere, we wish it distinctly understood to be the rule of the federal courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence. The expressed intentions of the testator should not be thwarted without clear reason therefor."

Furthermore, there is no evidence in the case at bar that any one of the beneficiaries under the will, in the slightest degree, tried to influence the testatrix. Also, the fact that the testatrix did not attempt to make any changes in the will after the execution of the last will is a fact to be considered, (See Brooke vs. Barnes, 61 App. D. C. 161, 58 F. (2d) 887). In the case of McCartney vs. Holmquist, *supra*, the Court at page 336 stated as follows:

> "Complaint is made of the refusal of the trial judge to give to the jury certain requested prayers for instructions. These we have examined and compared with the charge given by the Court. It would serve no useful purpose to set out the requests and charge in terms. It is elementary that where a charge given fully informs the jury as to the law, it is not error to refuse requested instructions to the same effect."

The Court in MacMillan vs Knost, *supra*, at page 262, laid down the same proposition, see page 9, *supra*.

Also in the case of Sorrels vs. Alexander, 79 App. D. C. 112, 142 F. (2d) 69, the Court said:

> "There was substantial evidence on which the Court may properly submit the two queries (capacity and undue influence) to the jury. In this view, while we might have reached a different result, we may not on that account substitute our guess for that of the jury."

The charge to the jury, by the trial Court, was complete, clear, and understandable. The petitioners make much of the fact that the Court in discussing the question of undue influence, told the jury that they must find that the testatrix was held "in bond or as the book states in chains". It is submitted that in the case of Towson vs. Moore, 11 App. D. C. 377, the Court indicated that the law in this jurisdiction was properly expressed in those terms when it stated at page 381:

> "Undue influence says the Supreme Court of the United States in the case of Conley vs. Nailor, 118 U. S. 127, 134, 'the undue influence for which a deed or will will be annulled must be such that the party making it has no free will, but stands *in vinculis*. It must amount to force or coercion, destroying free agency (citing, Stulze vs. Schaeflle, 16 Jurist 909, citing other cases).' In this same connection that Court cites with approval the case of Eckert vs. Floury, 43 Pennsylvania State 46, and the case of Davis vs. Calvert, 5 Gill and J. 269, 302 in both of which the same doctrine is laid down in substantially the same language."

Furthermore no objection was made to the Court's charge by counsel for the petitioners and that they, therefore, waive any right to object to the same at this time. See Donovan vs. Brown, *supra*.

It is submitted that the argument contained on page 29 of the Petition for Writ of Certiorari in which counsel attempts to raise a question of interpretation of Rules 46 and 51 of the Federal Rules of Civil Procedure, is inapplicable in this particular case because counsel now attempts to

contend to this Court that the instruction of the trial judge to the jury was confusing and misleading and, therefore, that he comes into the doctrine set forth in the case of William vs. Powers, 135 F. 2nd 153; Hower vs. Roberts, 153 F. 2nd 726, when as a matter of fact, those cases are not applicable to the case at bar. In the first place, it does not appear from the record that any error was committed by the trial judge, and that these matters were not brought to the attention of the trial judge during the trial. When the trial judge completed his charge to the jury, which we submit was proper and gave to the jury a full understanding of the case, no objection was made by counsel for the petitioners. (R. 175.) It is only in exceptional cases where a plain miscarriage of justice appears from the record that a Court will take notice of errors that have not been called to the attention of the Court. (Hormel vs. Helvering, 312 U. S. 552.)

On page 31 of the Petition for Writ of Certiorari, the counsel for petitioners draws an unwarrant conclusion that the Circuit Court did not read the entire record in the case and we submit that such statements should not be made unless some proof is adduced that such was the fact. A perusal of the opinion of the Circuit Court at page 3 shows that not only did they consider those matters specifically called to their attention by counsel for the petitioners, but also said as follows:

> "Taking this view of the record before us, the trial judge properly directed a verdict on the third issue."

As a matter of fact, this statement indicates that the Court most carefully did read the record submitted to it by counsel.

5. The evidence in this case on the question of mental capacity and undue influence was conflicting and it was properly within the province of the jury to determine the

question. It is difficult to follow the argument of counsel and categorically answer each and every objection that he has raised.

In the case of Obold vs. Obold, No. 9403, decided July 14, 1947, 75 Washington Law Reporter 1045, the Court stated at page 1046 as follows:

> "We have gone to great pains to examine the testimony offered on the trial, and we find, as is usually the case, that there is considerable evidence pro and con on the question of mental capacity. But as to this, it is enough to say that all the evidence was fairly submitted to the jury under proper instructions of the Court and, in the circumstances, it is not permissible that we substitute our opinion for theirs. That leaves, then, only certain technical grounds of error in the admission and rejection of evidence and in the granting and refusing of certain prayers."

The petitioners did not object to the introduction of the will in the evidence.

This Court in Gas Consumers Association vs. Lely, 61 App. D. C. 29, 57 F. (2nd) 395 stated at page 30 as follows:

> "Of these assignments of error, the first is based upon the denial of a motion for a directed verdict at the close of the plaintiff's case, the exception to which was waived by the defendant company when it proceeded with its case upon its evidence, and therefore requires no discussion here.
>
> "And, similarly, the exception to the court's denial of a motion for a new trial needs no discussion, as no showing of abuse of discretion is attempted, or could be justified by the record if it were.
>
> "The fifth assignment of error that 'the court erred in its charge to the jury' is too general for consideration here, and the record does not show that any exception was taken when the charge was delivered or that any objection was made to it which the trial court could consider and correct."

Also the Court in the case of Richardson vs. Richardson, 72 D. C. 67, 112 F. (2) 19, stated at page 70 as follows:

> "Since we may consider on appeal only those rulings on the admissibility of evidence to which objection has been made in the trial court, we cannot review the admission in evidence of testimony by Mrs. Mitchell, to which no objection was made, concerning a telephone conversation allegedly had with the defendant concerning the latter's relations with Mr. Mitchell."

In the case of Donovan vs. Brown, in 75 U. S. App. 93, 124 F. (2) 295, a *Per Curiam* stated as follows:

> "On this appeal, appellant objects to the trial court's charge to the jury, but the so-called bill of exceptions does not indicate that he did so at the trial. The objection comes too late. Martin v. Washington Times Co., 67 App. D. C. 11, 89 F. 2d 230. It is a salutary rule that errors which the trial court is given no opportunity to correct will not, in general, be considered on appeal."

6. It was not an error or prejudicial to petitioner's case for the Trial Court to exclude testimony of Nurses Scott and Edwards as to the particular disease from which the testatrix was suffering prior to the time she signed the will on April 14, 1944. Again it is significant to point out that Mr. Diamond who represented Mabel Adams, objected to Miss Scott testifying to any matters that resulted from her privileged position, and at that time, Mr. Maddox did not indicate to the contrary to the Court. Furthermore, in the case of Eureka Md. Assurance Co. vs. Gray, 74 App. D. C. 191, 121 F. (2d) 104, the Court determined that an intern came within the prohibition of the Statute D. C. Code—Title 14, 503, concerning a physician's testifying as to any information obtained by him in his professional capacity.. By analogy this statute should bar a nurse, who stands in a similar position to a patient, as an intern, from testifying as to any particular disease or illness from which the testatrix was suffering. For in that case, at page 194, the Court stated as follows:

> "The local statute is very broad. It forbids disclosure by the physician of any information obtained by him in his professional capacity. The intern is himself a physician * * * In many instances he does the work of the physician and in other respects relieves the physician of professional services which he would ordinarily perform. It would be straining the law to hold that disclosures made to him by the patient are not equally privileged as those made to the physician in charge."

There was no showing from the evidence that either nurse had sufficient training and qualification so as to testify from her own knowledge as to the type of disease or illness from which the testatrix suffered. In the case of Miss. Power and Light Co. vs. Jordan, 143 Southern 483, 164 Miss. 174, the Court at page 485 stated as follows:

> "As to the testimony of the nurses, we are of the opinion that they did not qualify sufficiently to testify as experts and could not do so from the mere training given nurses. In order to qualify as experts, there must have been not only training in different diseases and symptoms, but there must have been sufficient practical experience to enable them to discriminate between symptoms and conditions of different diseases."

It is submitted that we fail to see where the rule or law as contended by the attorney for the petitioners has been clearly or inferentially laid down by either our Code or by the ruling Federal Law.

7. It is submitted that the trial Court was correct in refusing to allow the petitioners, under the facts in this case, to go completely into the execution of the power of attorney and to the management of the household affairs of the testatrix, including events after the death of the testatrix. Nowhere have the appellants shown that they were prejudiced by the Court's rulings and furthermore the Court did, when the matter was properly presented for the purpose of contradicting Mrs. Metz, allow the introduction into evidence the power of attorney so that the

matter was before the jury when the jury considered this case. See *In Re* Carpenter's Will, 300 N. Y. S. 375, where the question before the Court pertained to and involved the matter of a bill of particulars and the Court at page 376 stated as follows:

> "The bill of particulars was properly required * * * the general rule is that pleadings and proof of facts subsequent to the execution of a will are inadmissible on the charge that the instrument is the product of undue influence and fraud. Here, however, the charge is beyond the usual scope * * * it is claimed that the execution of the will, the issue of the Power of Attorney seven days later, the stripping of the decedent of certain property between the date of execution of the will and his death, her part and parcel of the general fraudulent plan or scheme and the exercise of undue influence. In a given situation, particularly on the issue of actual fraud, no facts tending to prove such fraud are irrelevant as they reasonably bear upon that issue.
>
> "It may be, therefore, that this is the usual case. Whether or not it is cannot be determined with finality until the trial of the action. It may then appear that the situation is without the general rule."

Therefore, the Court after hearing the evidence decided that this evidence came under the general rule that matters prior and subsequent to the execution of the will did not have any direct connection with the execution of the will and, therefore, was properly excluded.

As was pointed out in the case of Olmstead vs. Webb, 5 App. D. C. 38,

> "Much must be left to the sound discretion of the trial judge to discriminate between such facts that are merely collateral and foreign to the issue and such as are connected with it. And, it is only in cases of a clear abuse of such discrimination, that the appellate court will take cognizance thereof."

Also in the case of Boosalis v. Crawford, 69 App. 141, 99 F. 2d 374, the Court at pages 143-144 stated as follows:

> "The testimony of certain police officers as to their observation of the use of the machines by others was

objected to as *res inter alios acta*. This rule of exclusion is designed to apply to evidence of transactions not affecting a party to the litigation and to which he was not a party. See Humble, Evidence (1934) paragraph 342. But the rule is one merely of auxiliary policy authorizing a trial judge to exclude evidence which unduly multiplies issues or which, though relevant, may be unfairly prejudicial. See Hughes, Evidence (1907) pp. 36-7; 1 Wigmore, Evidence (2nd ed. 193) c. 16, and especially therein Section 443 and 444. * * * The manner and effect of the operation of the machines by members of the public, whether testified to by players themselves or by those observing players, is relevant to this issue; and such relevancy is not dependent upon the resolution of collateral issues. The evidence was not unfairly prejudicial."

Thus, it can be seen that the trial judge had it within his power to exclude such evidence which would have unduly multiplied the issues in the case or which, if relevant, may have been unfairly prejudicial and there is no showing on the part of the petitioners that they were in any manner prejudiced by the ruling of the Court in excluding the evidence in question. At the end of petitioners' case and before the respondents were called upon to give evidence, there was no substantial evidence of any kind to indicate that any fraud had been committed upon the testatrix. When all of the evidence of the respondents was in before the Court and jury, and after the power of attorney had been introduced in evidence, there still was no substantial evidence to indicate any fraud practiced by anyone upon the testatrix.

8. The petitioners it is submitted, were afforded every right to properly and fully cross-examine each and every witness that was called on behalf of the respondents, and those questions which the Court excluded, were properly so excluded either because they were immatrial, irrelevant or inadmissible or for other reasons which were brought to

the Court's attention at the time those questions were asked. There is nothing to show that the right of cross-examination was in any manner denied to the attorney for the petitioners. Furthermore, a general exception of this kind comes too late at this time, especially when the Court gave counsel for the petitioners great leeway at the trial of the case.

9. As to the question of the unwarranted rebuke of counsel being improper, it is submitted that the Court was properly within its rights and no prejudice to the petitioners was shown. In the case of Sprinkle vs. Davis, 111 F. 2nd 925, the Court during the trial of the negligence case, in the presence of the jury, charged the defendant's counsel with constant breaches of his ruling excluding from evidence a page of the record of a previous trial and declared that he would impose a fine upon said counsel if the practice continued. Subsequently in chambers, out of the presence of the jury, counsel for both parties agreed that the excluded evidence was immaterial because the fact was inconsistent and the judge so charged the jury but did not say anything about the severe and unmerited rebuke to the said counsel. In the case at bar, the so-called rebuke by the Court to counsel for the petitioners was not unmerited and a perusal of the record indicates that the Court had a difficult time during the course of the trial with counsel for the petitioners. Counsel for the petitioners regularly persisted in attempting to introduce evidence that the Court had already ruled upon. Furthermore, counsel for the petitioners attempted on numerous occasions, the quite unfair tactic of talking so loud at the bench so that the jury in the jury box and other persons in the Court could hear what he was saying to other counsel and the judge at the bench. (R. 182-185.) Petitioners do not show that the so-called rebuke has in any manner been prejudicial.

10. In the case at bar, the evidence clearly indicates that all the attesting witnesses to the will were in the room and saw the testatrix sign and execute the same and that thereafter these witnesses signed and subscribed to the will.

In the case of Bullock vs. Morehouse, 57 App. D. C. 231, 19 F. (2d) 705, the Court at page 233 cites with approval as follows:

> "It has been held, in so many cases, that it must now be taken to be settled law, that it is unnecessary for the testator actually to sign the will in the presence of the three witnesses who subscribe the same, but that an acknowledgment before the witnesses that it is his signature, or any declaration that it is his will, is equivalent to an actual signature in their presence and makes the attestation and subscription of the witnesses complete. * * * When, therefore, we find the testator knew this instrument to be his will; that he produced it to the three persons and asked them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him, we think the testator did acknowledge in fact, though not in words, to the three witnesses that the will was his."

Conclusion

It is contended that the judgment of the Circuit Court should be sustained.

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